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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ATLANTIC MUTUAL INSURANCE COMPANY, Plaintiff and Appellant, v. CHROMIUM GRAPHICS, INC., Defendant and Respondent.	D038266 (Super. Ct. No. GIN005069)

APPEAL from a judgment of the Superior Court of San Diego County, Lisa Guy-Schall, Judge. Affirmed.

Atlantic Mutual Insurance Company (Atlantic) appeals from a judgment entered against it on its action for declaratory relief against its insured, Chromium Graphics, Inc. (Chromium). The trial court concluded Atlantic had a duty to defend Chromium in a suit brought by its former employee, Patrick Tennant. Atlantic contends the judgment should

be reversed because the employment-related practices exclusion in its policy eliminated any duty to defend.

We conclude there was a potential for coverage because in Tennant's cause of action for slander, the allegedly defamatory statements by Chromium, were not made in the context of Tennant's employment. Rather, the statements related to Tennant's ongoing business relationship with one of Chromium's customers. Accordingly, there was a duty to defend on the part of Atlantic. Therefore, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Tennant was employed by Chromium from April 1990 until he was terminated in November 1997. In January 1998, Tennant began serving as a consultant to Japanese Printing Products USA, Inc. (JPP) -- a customer of Chromium. JPP was then in the process of negotiating a large order from Chromium, and Chromium learned that Tennant informed JPP it could obtain pre-press artwork from other sources at a lower price than offered by Chromium. At that time, JPP also told Chromium it was considering using a competitor. Chromium maintained that as a result of Tennant's conduct, it was forced to renegotiate a less profitable deal with JPP.

In December 1999, Tennant sued Chromium for, inter alia, breach of contract, wrongful discharge, intentional interference with economic advantage, and slander per se. In his slander per se cause of action, Tennant alleged that in the spring of 1998, several months after his employment was terminated, Chromium made false and disparaging comments about him to JPP, including telling JPP: "(a) that [Tennant] introduced [] JPP to another company in violation of his contractual obligations to CHROMIUM; (b) that

[Tennant] is a liar; (c) that [Tennant] is dishonorable (using the Japanese term for 'smelly') and does not keep his word." Tennant alleged the statements were particularly harmful because he was engaged in a business relationship with JPP at the time they were made, and JPP's parent company was based in Japan, and "the Japanese place a high value on honor, truthfulness and integrity in their business relationships."

Chromium tendered its defense to Atlantic, which had issued it two consecutive general liability polices covering the period from 1997 to 1999. The policies contained coverage for slander, but also contained an "Employment-Related Practices Exclusion" which excluded coverage for injury arising out of any:

> "(1) Refusal to employ;
>
> "(2) Termination of employment;
>
> "(3) Coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or other employment-related practices, policies, acts or omissions . . . ."

Atlantic accepted Chromium's defense under a full reservation of rights, including a specific reservation based on the above exclusion. Atlantic then filed an action for declaratory relief pertaining to the coverage dispute between it and Chromium. On January 11, 2001, it moved for summary judgment declaring that (1) its polices provided no coverage relating to Tennant's suit, and (2) there was not a potential for coverage, and thus, Atlantic had no duty to defend Chromium.

The trial court denied the motion, concluding there was potential for coverage based on the allegations made by Tennant in his cause of action for slander per se, and thus, Atlantic had a duty to defend Chromium in the underlying lawsuit.

DISCUSSION

The duty to defend the insured in a legal action "runs to claims that are merely potentially covered, in light of facts alleged or otherwise disclosed. [Citations.]" (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 46.) In a "mixed" action where some claims are covered and others are not, the insurer has a duty to defend the action in its entirety. (*Id.* at p. 48.) Atlantic admits the policies contained coverage for slander, but contends the employment related practices exclusion precluded coverage and eliminated the duty to defend in this case. This contention is unavailing.

The issue is whether the allegedly defamatory statements by Chromium were made in the context of Tennant's employment with the company; if they were not, Atlantic owed Chromium a duty to defend. (*Golden Eagle Ins. Corp. v. Rocky Cola Café, Inc.* (2001) 94 Cal.App.4th 120, 127-128; *Frank and Freedus v. Allstate Ins. Co.* (1996) 45 Cal.App.4th 461, 471-472; see also *HS Services, Inc. v. Nationwide Mut. Ins. Co.* (9th Cir. 1997) 109 F.3d 642, 646.) Here, the alleged statements to the effect that Tennant was a liar, dishonorable and did not keep his word, were made in the context of the competitive marketplace, purportedly to harm Tennant in his ongoing business relationship with JPP and to prevent JPP -- an important customer of Chromium, from doing business with a competitor. They were not directed toward Tennant's performance as an employee of Chromium and not made in the context of his employment. (*Golden Eagle Ins. Corp. v. Rocky Cola Café, Inc., supra*, 94 Cal.App.4th at pp. 128-129.) Accordingly, the employment related practices exclusion did not preclude the potential

for coverage or eliminate Atlantic's duty to defend. (*Ibid.*) Therefore, we affirm the judgment.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to Chromium.

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.